PD-0176-18
COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
Transmitted 5/24/2018 6:14 PM
Accepted 5/25/2018 11:05 AM
DEANA WILLIAMSON
CLERK

No. PD-0176-18

COURT OF CRIMINAL APPEALS
OF TEXAS

FILED
COURT OF CRIMINAL APPEALS
5/25/2018
DEANA WILLIAMSON, CLERK

The State of Texas,
Appellant

v.

Jose Ruiz
Appellee

from the Court of Appeals for the
Thirteenth Judicial District at Corpus Christi

13-13-00507-CR

BRIEF FOR THE STATE

An appeal from the 25th Judicial District Court, Gonzales County, Texas
The Honorable William D. Old III., Judge Presiding

Paul Watkins
County Attorney
Gonzales County, Texas

Keri L. Miller
First Assistant County Attorney
415 Saint Louis Street
Gonzales, TX 78629
State Bar No. 24051960
(830) 672-6527 FAX (830) 672-5868
kmiller@co.gonzales.tx

Identity of Judge, Parties, and Counsel

Trial Court.....**The Honorable William D. Old, III.**

Presiding Judge
25th Judicial District Court
Gonzales County, TX

Appellant .....**The State of Texas**

Paul Watkins
County Attorney

Keri L. Miller
First Assistant County Attorney
TRIAL AND APPELLATE COUNSEL
Gonzales County Attorney's Office
415 Saint Louis Street
Gonzales, Texas 78629

Appellee .....**Jose Ruiz**

Mark Symms
TRIAL AND APPELLATE COUNSEL
(Original Submission)
417 Saint George Street, Second Floor
Gonzales, Texas 78629

Chris Iles
APPELLATE COUNSEL
(After Remand)
Park Tower
710 Buffalo Street, #802
Corpus Christi, TX 78401

Table of Contents

Index of Authorities

Cases

United States Supreme Court Cases

Texas Cases

Statutes, Codes, and Rules

Out of State Cases and Statutes

To the Honorable Court of Criminal Appeals of Texas:

Statement Regarding Oral Argument

This Honorable Court did not permit oral argument when it granted the State's Petition for Discretionary Review. Should this Honorable Court decide that oral argument would be beneficial, Counsel would be honored to appear on behalf of the State.

Statement of the Case

Jose Ruiz was indicted for driving while intoxicated, third or more. (Cl. R. vol. 1 of 1, at 3-4). Ruiz filed a motion to suppress the results of his blood test based on *Missouri v. McNeely*, 133 S. Ct. 1552 (2013). (Ct. R. vol. 1 of 1 at 4-23). The trial court granted the motion, and the State appealed. (Cl. R. vol. 1 of 1, at 16-18).

Statement of Procedural History

The court of appeals held in its original opinion that neither implied consent nor exigent circumstances justified the unconscious blood draw. *State v. Ruiz,* 509 S.W.3d 451 (Tex. App.—Corpus Christi 2015, pet. granted). In 2016, this Honorable Court granted the State's petition for discretionary review. After argument, the Court remanded the case for the court of appeals to consider exigent circumstances. *State*

v. Ruiz, PD-1362-15, 2017 Tex. Crim. App. LEXIS 183, 2017 WL 430291 (Tex. Crim. App. Feb. 1, 2017)(not designated for publication). The court of appeals issued its opinion on remand on January 11, 2018. *State v. Ruiz,* No. 13-13-00507-CR, 2018 Tex. App. LEXIS 302 (Tex. App.—Corpus Christi Jan. 11, 2018)(designated for publication). On April 25, 2018, this Honorable Court granted the first ground in the State's Petition for Discretionary Review.

Issue Presented

Is it unreasonable under the Fourth Amendment for an officer to rely on a driver's implied consent to a blood draw when the driver was involved in an accident, there is probable cause to believe he is intoxicated, and where the driver's own unconsciousness prevents the officer from effectively obtaining the driver's actual consent?

Statement of Facts

In September 2012—six months before the Supreme Court's April 2013 decision in *Missouri v. McNeely*—Sergeant Bethany McBride responded to a two vehicle accident around midnight. (Ct. R. vol. 1 of 1, at 7). When Sergeant McBride arrived at the scene she observed a Lincoln Navigator had collided with a Pontiac. (Ct. R. vol. 1 of 1, at 7, 13). The driver of the Pontiac remained on the scene but the driver of the Lincoln fled. (Ct. R. vol. 1 of 1, at 7). Two witnesses gave Sergeant McBride a description of the driver of the Lincoln and stated that he had run behind a nearby carwash. (Ct. R. vol. 1 of 1, at 7). In the Lincoln, Sergeant McBride located insurance paperwork that belonged to Ruiz. (Ct. R. vol. 1 of 1, at 7-8). She also ran the license plate, which came back to Ruiz. (Ct. R. vol. 1 of 1, at 8). While inside the vehicle

Sergeant McBride observed several Bud Light cans in the front seat area. (Ct. R. vol. 1 of 1, at 8).

Officers searched for and ultimately found Ruiz in a field behind the car wash. (Ct. R. vol. 1 of 1, at 8-9). He was unresponsive, and it took several officers to carry him to the patrol unit. (Ct. R. vol. 1 of 1, at 9). Sergeant McBride observed the very strong odor of alcoholic beverages coming from Ruiz. (Ct. R. vol. 1 of 1, at 9-10). Sergeant McBride did not observe any injuries on Ruiz and determined that he was unresponsive because of the amount of alcohol in his system. (Ct. R. vol. 1 of 1, at 10-11).

EMS arrived on scene to treat Ruiz. (Ct. R. vol. 1 of 1, at 11). EMS performed several sternum rubs to try to get Ruiz to be responsive, but Ruiz never responded. (Ct. R. vol. 1 of 1, at 11). EMS also checked Ruiz's blood pressure, and based on his condition, transported him to the hospital for treatment. (Ct. R. vol. 1 of 1, at 11).

Sergeant McBride went to the hospital and arrested Ruiz for driving while intoxicated. (Ct. R. vol. 1 of 1, at 12). When she ran Ruiz's criminal history she discovered Ruiz had four convictions for DWI. (Ct. R. vol. 1 of 1, at 17). She prepared the necessary paperwork and a

qualified hospital lab technician drew Ruiz's blood. (Ct. R. vol. 1 of 1, at 12). Ruiz remained unresponsive the entire time. (Ct. R. vol. 1 of 1, at 12-13).

In the trial court, Ruiz moved to suppress his blood-test results under *Missouri v. McNeely*, 133 S. Ct. 1552 (2013) and the trial court held an evidentiary hearing. (Ct. R. vol. 1 of 1, at 4-5). In its findings of fact and conclusions of law, the trial court found Sergeant McBride's testimony credible in all respects. (Cl. R. Supp. vol. 1 of 1, at 11). The trial court also found that Ruiz was unconscious at the time of the blood draw and did not revoke his implied consent to the blood draw. (Cl. R. Supp. vol. 1 of 1, at 11, 12). The trial court found itself bound by *McNeely,* and granted the motion to suppress. (Cl. R. Supp. vol. 1 of 1, at 11).

Summary of the Argument

Ruiz's blood was drawn pursuant to his consent. The Texas Implied Consent laws establish a driver's consent to a blood draw for alcohol testing which remains in full effect until that consent is withdrawn or revoked.

Argument

A Blood Draw Performed with Implied Consent Never Revoked is Reasonable under the Fourth Amendment

I. United States Supreme Court Precedent

"The overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State." *Schmerber v. California,* 384 U.S. 757, 767 (1969). Ordinarily, compelling a person to submit to a blood sample must be justified under the Fourth Amendment, which requires securing a search warrant or the existence of one of the recognized exceptions to the warrant requirement. *Missouri v. McNeely,* 133 S. Ct. 1552, 1558 (2013). It is well-settled that one of the specifically established exceptions to the warrant requirement is that the person consented to the search. *Schneckloth v. Bustamonte,* 412 U.S. 218, 219 (1973).

The United States Supreme Court in *Birchfield v. North Dakota,* 136 S. Ct. 2160 (2016), acknowledged that it had previously "referred approvingly to the general concept of implied consent laws" that imposed civil penalties and evidentiary consequences, like Texas, and it continued to do so, reasoning that "it is well established that a search is reasonable when the subject consents, and that sometimes consent to a

search need not be express but may be fairly inferred from the context." *Birchfield,* 136 S. Ct. at 2185. While the Supreme Court made it clear that nothing in its opinion was to "cast doubt" on the constitutionality of implied consent statutes it ultimately decided to limit the "consequences to which motorists may be deemed to have consented by virtue of their decision to drive on public roadways" where a state "not only insist[s] upon an intrusive blood test, but also to impose criminal penalties on the refusal to submit to such a test." *Birchfield* at 2185-186. The court reasoned that, based on the particular facts before it, a breath test was a reliable, less intrusive test that "would satisfy the State's interest in acquiring evidence to enforce its drunk-driving laws." *Id.* at 2186.

II. Texas Implied Consent Law

In Texas, the implied consent laws establish a driver's initial voluntary consent to a blood draw for alcohol testing which remains in full effect until that consent is withdrawn or revoked. "Driving is not a constitutional right but a privilege;" that privilege "is subject to reasonable regulations formulated under the police power in the interest of welfare and safety of the general public." *Ex Parte Tharp,*

935 S.W.2d 157, 159 (Tex. Crim. App. 1996). Under the Texas Transportation Code a person who is arrested for operating a motor vehicle in a public place while intoxicated is deemed to have consented to the taking of one or more specimens of the person's breath or blood for analysis to determine the alcohol concentration. Tex. Transp. Code 724.011 (West). A person who is dead, unconscious, or otherwise incapable of refusal is considered not to have withdrawn his consent to a blood test. Tex. Transp. Code Ann. § 724.014 (West).

"The implied consent law does just that—it implies a suspect's consent to search in certain circumstances." *Beeman v. State,* 86 S.W.3d 613, 615 (Tex. Crim. App. 2002). Specifically, "[t]he implied consent law expands on the State's search capabilities by providing a framework for drawing DWI suspects' blood in the absence of a search warrant. It gives officers an additional weapon in their investigative arsenal, enabling them to draw blood in certain limited circumstances even without a search warrant." *Beeman,* 86 S.W.3d at 616.

This Honorable Court in *State v. Villarreal,* 475 S.W.3d 784, 800 (Tex. Crim. App. 2014), left open the possibility that implied consent, that had *not* been withdrawn or revoked, could be free and voluntary

consent under the Fourth Amendment by holding that "implied consent that has been *withdrawn or revoked* by a suspect cannot serve as a substitute for the free and voluntary consent that the Fourth Amendment requires."

III. Consent, never withdrawn or limited, justified the blood draw

In *Valtierra v. State,* this Honorable Court held that consent to search for a particular item implicitly includes consent to search all areas where the item may be found unless consent is expressly limited. 310 S.W.3d 442, 449-52 (Tex. Crim. App. 2010). That holding supports the concept that consent once given is continuous until it is limited or revoked in some objective way by the defendant.

When Ruiz voluntarily drove on Texas roadways, he gave his consent to his blood being drawn if an officer later developed probable cause to believe that he had been driving while intoxicated. That consent remained in full effect until it was withdrawn or revoked, and the trial court specifically found Ruiz never did. (Cl. R. Supp. vol. 1 of 1, at 12). Further, there were no less intrusive tests that could have been performed on Ruiz to determine his blood alcohol content because of his

unconsciousness. Because Ruiz's consent to a blood test was never withdrawn or revoked, his blood was drawn pursuant to his consent.

IV. Other states have found unconscious draws constitutional

Many states have answered whether implied consent can satisfy the consent exception under the Fourth Amendment post-*McNeely* and *Birchfield.* Most states that have addressed this issue have decided that implied consent satisfies the consent requirement under the Fourth Amendment when that consent has not withdrawn or revoked.

The Colorado Supreme Court in *People v. Hyde,* 393 3d. 962, 964-65 (Colo. 2017) addressed whether an unconscious driver's (sedated by an ambulance crew because of his combativeness) statutory consent satisfied the consent exception to the Fourth Amendment. The Colorado Supreme Court noted that implied consent laws emerged when the "states found themselves confronting a grave problem: the devastating consequences of drunk drivers on the nation's roadways" and laws enacted against driving while intoxicated were not enough to "conquer the problem." *Hyde,* 393 P.3d at 965 (*citing Birchfield,* 136 S. Ct. at 2167). Implied consent laws were enacted to "encourage drivers to submit to alcohol tests when they are suspected of driving while

intoxicated". *Hyde,* 393 P.3d at 966. The court noted that, under its statutory scheme, a driver that refuses to submit to a test is subject to certain administrative and evidentiary consequences spelled out in the statutory scheme. *Hyde,* 393 P.3d 966. But an unconscious driver "shall be tested," meaning the "police need not wait until a drunk-driving suspect returns to consciousness, in order to afford that suspect an opportunity to refuse." *Hyde,* 393 P.3d 966. The court addressed the implications of the Supreme Court's holding in *Birchfield,* noting that although the Court had "ruled out justifying warrantless blood tests on the basis of the search-incident-to-arrest exception, it expressed approval for justifying them on the basis of still another exception: consent." *Hyde,* 393 P.3d at 967. The court noted that the Supreme Court in *Birchfield* endorsed the use of implied consent laws, explaining that "It is well established that a search is reasonable when the subject consents, and that sometimes consent to a search need not be express but may be fairly inferred from context." *Hyde,* 393 P.3d at 967.

The court held "by choosing to drive in the state of Colorado, Hyde gave his statutory consent to chemical testing in the event that law enforcement officers found him unconscious and had probable cause to

believe he was guilty of DUI," and this statutory consent satisfied the consent exception to the Fourth Amendment requirement. *Hyde,* P.3d at 967-68. The court explained that there was no constitutional right to refuse a blood-alcohol test; instead, it was "simply a matter of grace bestowed by the state legislatures." *Hyde,* 393 P.3d at 969 (*citing South Dakota v. Neville,* 459 U.S. 553, 560 n.10 (1983)). The Court noted the Colorado legislature (like Texas) "did not intend to bestow that grace upon unconscious drivers." *Hyde,* 393 P.3d at 969. Thus, by driving in Colorado, the driver consented to the requirement that he submit to blood-alcohol testing where the driver was found to be unconscious and there was probable cause to believe he was driving while intoxicated.

The Colorado Supreme Court also rejected the driver's argument that allowing a blood test on an unconscious driver violates the Equal Protection Clause of the Fourteenth Amendment "by treating unconscious drivers differently from a conscious driver, who is given the opportunity to refuse a test." *Hyde,* 393 P.3d at 969. The court reasoned that "when drivers are unconscious, law enforcement officers are deprived of the evidence they typically rely on in drunk-driving prosecutions: unlike conscious drivers, unconscious drivers cannot

perform roadside maneuvers, display speech or conduct indicative of alcohol impairment, or admit to alcohol consumption." *Hyde,* 393 P.3d at 969. "In order to effectively combat drunk driving, the state needs some means of gathering evidence to deter and prosecute drunk drivers who wind up unconscious" and the implied consent law "satisfies that need." *Hyde,* 393 P.3d at 969.

The Idaho Supreme Court in *State v. Wulff,* 337 P.3d 575, 582 (Idaho 2014), recognized that its implied consent statute "must jump two hurdles to qualify as voluntary: (1) drivers give their initial consent voluntarily and (2) drivers must continue to give voluntary consent." *Wulff,* 337 P.3d at 582. "Drivers in Idaho give their initial consent to evidentiary testing by driving on Idaho roads voluntarily." *Wulff,* 337 P.3d at 582. Ultimately, the Supreme Court of Idaho, like this Honorable Court in *State v. Villarreal,* 475 S.W.3d 784 (Tex. Crim. App. 2014), rejected an irrevocable implied consent rule. *Wulff,* 337 P.3d at 582.

After *Wulff,* the Idaho Court of Appeals, the highest court to rule on the issue thus far, examined whether a driver's unconsciousness served to revoke or withdraw his previously given implied consent. The

Court of Appeals held that it did not, primarily because the driver afforded himself the privilege of driving on Idaho roadways. *Sims v. State,* 358 P. 3d. 813 (Idaho Ct. App. 2015, rev. denied); *Bobeck v. Idaho Transp. Dep't,* 363 P.3d 861 (Idaho Ct. App. 2015, rev. denied). The Court of Appeals noted that the Idaho Supreme Court had held that implied consent was still valid but could be terminated by a "defendant's refusal, protest, or objection to alcohol concentration testing." *Sims,* 358 P.3d at 817. *Bobeck,* 363 P.3d at 866. The Court of Appeals upheld the warrantless withdrawal of the unconscious driver's blood because the driver's implied consent was still effective at the time of the blood draw and the driver's unconsciousness did not effectively operate as a withdrawal of the driver's consent. *Sims,* 358 P.3d at 817-818.

Florida recently addressed the validity of implied consent justifying an unconscious driver's warrantless blood draw post *McNeely* and *Birchfield* in *McGraw v. State,* No. 4D17-232, 2018 Fla. App. LEXIS 3943, 2018 WL 1413038 (Fla. Dist. Court. App. March 21, 2018). The Florida implied consent statutes closely resemble Texas's implied consent statutes and (as applicable to this case) states "any person who

is incapable of refusal by reason of unconsciousness or other mental or physical condition is deemed not to have withdrawn his or her consent." *McGraw,* 2018 Fla. App. LEXIS 3943, at 7. The court considered the passage in *Birchfield* that police could apply for a warrant "if need be" when an arrested driver was unconscious. *McGraw,* 2018 Fla. App. LEXIS 3943, at *12; *Birchfield,* 136 S. Ct. at 2184-85("it is true that blood tests, unlike breath test, may be administered to a person who is unconscious (perhaps as a result of a crash) or who is unable to do what is needed to take a breath test due to profound intoxication or injuries. But we have no reason to believe that such situations are common in drunk-driving arrests, and when they arise, the police may apply for a warrant if need be"). The Florida court acknowledged that on "first read" the passage appeared to render its implied consent law unconstitutional as it applied to unconscious drivers. *McGraw,* 2018 Fla. App. LEXIS 3943, at *12. But the court ultimately determined that

> *Birchfield* actually reaffirmed the constitutionality of implied consent laws, stating its prior opinions have referred approvingly to the general concept of implied consent laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply. Despite other conclusions in the [*Birchfield*] opinion, the [United

> States Supreme] Court specifically stated that nothing we say here should be read to cast doubt on them.

McGraw, 2018 Fla. App. LEXIS 3943, at 12-13 (*quoting Birchfield* 136 S. Ct. at 2184-85).

The court upheld the constitutionality of the blood draw, finding significant the United States Supreme Court's distinction and separate categorization of implied consent laws that impose criminal penalties and those that impose evidentiary or administrative penalties. *McGraw,* 2018 Fla. App. LEXIS 3943, at 13-14. The court reasoned that

> if no implied consent law could survive the Fourth Amendment, the Court would have stated as much. There was no reason for the Supreme Court to separately categorize implied consent laws…if both categories fail to satisfy the Fourth Amendment. Instead, we are comfortable concluding the Court did so to excise those that impose criminal penalties from constitutional protection, while leaving those that merely impose administrative or evidentiary penalties.

McGraw, 2018 Fla. App. LEXIS 3943, at 13-14. Because Florida's implied consent law falls in the latter category—as does Texas's—it remains constitutionally valid. *See McGraw,* 2018 Fla. App. LEXIS 3943, at 14.

The court went on to hold that while the United States Supreme Court held that "the reasonableness of blood tests must be judged in light of the availability of the less intrusive alternative of a breath test, when it comes to the unconscious driver that "lesser intrusive alternative" is not available. *McGraw,* 2018 Fla. App. LEXIS 3913, at 14, 21 (*quoting Birchfield,* 136 S. Ct at 2184).

In *Wolfe v. Commonwealth,* 793 S.E.2d 811, 814 (Va. Ct. App. 2016), the Virginia Court of Appeals held the constitutionality of implied consent was "well established." The court explained that the constitutionality of Virginia's implied consent laws were not implicated by the Supreme Court's opinion in *Birchfield,* because Virginia—like Texas—imposed civil and not criminal penalties on a driver. *Wolfe,* 793 S.E.2d at 814. The trial court did not err in denying the driver's motion to suppress because he implicitly consented to have his breath or blood tested after he was driving on a public highway and thus his blood draw was "lawful under the *implied consent* exception to the search warrant requirement." *Wolfe,* 793 S.E.2d at 815.

In *Martini v. Commonwealth,* No. 0392-15-4, 2016 Va. App. LEXIS 67, 2016 WL 878017 (Va. Ct. App. March 8, 2016)(not

designated for publication), the Virginia Court of Appeals rejected the driver's argument that her consent was not voluntary because she was in a "diminished mental and physical state" and she was "told by law enforcement that she had already consented before her consent was requested" by holding that the unconsciousness or incoherence of a driver does not constitute a refusal "because consent is continuing." *Martini,* 2016 Va. App. LEXIS 67 at *11.

In *State v. Brar,* 898 N.W.2d 499 (Wis. 2017), the Wisconsin Supreme Court held that a driver gives his initial valid consent under the Fourth Amendment through his conduct of driving on the roads in Wisconsin. The court rejected holdings from intermediate courts distinguishing "actual consent" and "implied consent," stating that the courts' "reasoning implies a distinction between implied consent and consent that is sufficient under the Fourth Amendment. Such a distinction is incorrect as a matter of law." *Brar,* 898 N.W.2d at 506. "The use of the word 'implied' in the idiom 'implied consent' is merely descriptive of the way in which an individual gives consent. It is no less sufficient consent than consent given by other means." *Brar,* 898 N.W.2d at 506. "Consent by conduct or implication is constitutionally

sufficient consent under the Fourth Amendment. We reject the notion that implied consent is a lesser form of consent. Implied consent is not a second-tier form of consent; it is well-established that consent under the Fourth Amendment can be implied through an individual's conduct." *Brar,* 898 N.W.2d at 507.

In Ohio, courts have held that the warrantless withdrawal of blood from a driver that was unconscious or incapable of refusing was done pursuant to their consent (and the consent exception to the warrant requirement). *State v. Hayes,* No. 26379, 2016-Ohio-7241 *47, (Ohio Ct. App.—2nd Dist. October 7, 2016, rev. denied) cert. denied by *Hayes v. Ohio*, 138 S. Ct. 476 (2017); *State v. Bloomfield,* 2015-Ohio-1082 (Ohio Ct. App.—4th Dist. March 10, 2015). The court in each case upheld the warrantless blood draw because the implied consent statutes provide that "any person who is dead or unconscious, or who otherwise is in a condition rendering the person incapable of refusal, shall be deemed to have consented" to a blood draw. *State v. Schuster,* No. CA2016-05-097, *26 (Ohio Ct. App.—12th Dist. June 5, 2017); *Hayes,* 2016-Ohio-1082 at *47; *Bloomfield,* 2015-Ohio-1082 at *30. In upholding an unconscious blood draw, the court in *Schuster,* 2017-Ohio-

4114 at *18, acknowledged the difficulty facing a police officer when encountering an unconscious individual he suspects has been driving while intoxicated. The court explained that the officer is both "concerned that the unconscious individual receive prompt medical attention" and aware of his "obligation to enforce the law prohibiting driving while intoxicated." *Schuster,* 2017-Ohio-1082 at *28 (*quoting State v. Taylor,* 442 N.E.2d 491 (Ohio Ct. App.—12th Dist. 1982). Permitting, the officer to get a blood test quickly (and without a warrant) while leaving the unconscious individual in the control of hospital authorities enables him to serve both goals. *Id.*

Other states also have held a driver gives his initial consent to a blood draw when he drives on public roadways and until that implied consent is withdrawn or revoked it remains valid consent under the Fourth Amendment. *See State. v. Weber,* 139 So. 3d 519 (La. 2014)(upholding a blood draw from a driver at the hospital without his express consent where the officer had reasonable grounds to believe the defendant was the driver of the vehicle that caused the fatal accident); *State v. Modlin,* 867 N.W.2d 609 (Neb. 2015)(finding that the existence of an implied consent statute is one of the totality of circumstances a

court should consider to determine voluntariness of consent and that while mere submission to authority is insufficient, the defendant chose to drive in Nebraska and did and said nothing to objectively manifest his refusal); *Cripps v. State,* 387 P.3d 906 (Okla. Crim. App. 2016), *cert. denied* by *Cripps v. Oklahoma,* 137 S. Ct. 2186 (2017)(where the driver was unconscious after a fatal accident he had no right to revoke his implied consent and thus his blood was legally taken without a warrant); *State v. Gurule,* No. 33,375, 2014 N.M. App. Unpub. LEXIS 160, 2014 WL 3049592 (N.M. Ct. App. May 12, 2014, writ denied)(not designated for publication)(upholding defendant's blood draw based on his incapacity to consent and his resulting presumed consent under the Implied Consent Act).

V. Adverse rulings from other states

Some states have held that an unconscious driver's implied consent cannot satisfy the Fourth Amendment. In *Bailey v. State,* 790 S.E. 2d 98 (Ga. Ct. App. 2016, writ dsm'd), the Georgia Court of Appeals held that the driver's implied consent was insufficient to satisfy the Fourth Amendment, and he could not have given actual consent to the search and seizure of his blood and urine, as he was unconscious. An

evaluation of the case relied upon by the Georgia Court of Appeals to reach this conclusion suggests that Georgia uses a stricter approach to determine whether voluntary consent was given to a blood draw. In *Williams v. State,* 771 S.E.2d 373, 374-75 (Ga. 2015), the officer read the driver the statutory implied consent notice and asked the driver to submit to a blood or urine test. The officer told the driver the request for a blood or urine specimen was a "yes or no" question and the driver responded with "yes." *Williams,* 771 S.E.2d at 374-75. The court emphasized that "there was no other conversation about the testing, i.e., the officer did not ask Williams if Williams was willing to freely and voluntarily give a test. The officer read Williams the implied consent and that was pretty much the end of it." *Williams,* 771 S.E.2d at 375. The court ultimately remanded the case to the trial court to determine whether the driver gave his actual consent to the blood test by freely and voluntarily consenting under the totality of the circumstances. *Williams,* 771 S.E.2d at 376.

On remand, the trial court found that the State showed that Williams had acquiesced to the officer's request for a sample but that he was so intoxicated that he did not actually consent. *Williams v. State,*

788 S.E.2d 860, 863-65 (Ga. Ct. App. 2016). On the State's appeal of that finding, the Georgia Court of Appeals affirmed and held that in order to show voluntary consent, the State must prove that the defendant consented "out of rational intellect and free will." *Williams,* 788 S.E.2d at 866.

Previous Texas cases utilize a different standard than Georgia in determining whether a person voluntarily consented to a search under the Fourth Amendment and thus *Bailey's* persuasiveness is lessened. In Texas "a person's consent to search can be communicated to law enforcement in a variety of ways, including by words, action, or circumstantial evidence showing implied consent." *Meekins v. State,* 340 S.W.3d 454, 458 (Tex. Crim. App. 2011). Consent to search "may not be coerced, by explicit or implicit means, by implied threat or covert force." *Meekins,* 340 S.W.3d at 459. "Courts review the totality of the circumstances of a particular police-citizen interaction from the point of view of the *objectively reasonable person*, without regard for the subjective thoughts or intents of either the officer or the citizen." *Meekins,* 340 S.W.3d at 458. The court must determine if the person's "will was overborne and his capacity for self-determination critically

impaired" as the result of physical or psychological pressures *brought to bear by law enforcement*. *Fienen v. State,* 390 S.W.3d 328, 333, 336 (Tex. Crim. App. 2012); *Meekins,* 340 S.W.3d at 458.[1] Further, not all "compliance" is mere acquiescence to authority and "mere acquiescence" may constitute a finding of consent in the right circumstances. *Meekins,* 340 S.W.3d at 464-65; *See also State v. Kelly,* 204 S.W.3d 808 (Tex. Crim. App. 2006)(holding that "mere acquiescence" to a blood draw by hospital personnel can constitute consent).

In *State v. Romano,* 800 S.E.2d 644 (N.C. 2017), the State conceded and the Supreme Court of North Carolina agreed that the statute that allowed a blood draw to be taken from an unconscious driver was unconstitutional as applied to the defendant because it created an impermissible categorical exception to the warrant exception.[2] In *State v. Havatone,* 389 P.3d 1251, 1254-55 (Ariz. 2017),

---

[1] Also, there is no requirement that a defendant be informed he has the right to refuse a search for his consent to be voluntary. *Ribble v. State,* 530 S.W.2d 551, 553 (Tex. Crim. App. 1974). *See also Harrison v. State,* 205 S.W.3d 549, 552-54 (Tex. Crim. App. 2006)(upholding a driver's consent to a urine test even though the driver was not informed that she had the license revocation associated with refusing to provide a blood or breath sample would not apply because the officers did nothing to mislead her).

[2] The court seemed to take exception to facts not present in Ruiz's warrantless blood draw. In *Romano,* there may have been a missed opportunity to request consent. The officer was present at the hospital when the medical personnel determined that the driver needed to be medicated to calm him down. *Romano,* 800 S.E.2d at 680.

the State conceded and the Arizona Supreme Court agreed that a blood draw from an unconscious individual is constitutional only when case-specific exigent circumstances prevent law enforcement officers from obtaining a warrant.

In *Commonwealth v. Myers,* 164 A.3d 1162 (Pa. 2016), the Pennsylvania Supreme Court held that where a driver was unconscious and could not therefore choose whether to exercise his right to refuse the chemical test or to provide voluntary consent, his blood draw could not be justified under the consent exception. This case is readily distinguishable from our case because the Pennsylvania implied consent statutes gives an absolute right to *any* driver to refuse chemical testing. *Myers,* 164 A.3d at 1171-172. The Pennsylvania implied consent statutes does not contain a provision that pertains to unconscious drivers like that in the Texas Transportation Code Section 724.014. *See* 75 Pa.C.S. 1547.

Before the driver was medicated the officer told the nurse that "she would likely need a blood draw for law enforcement purposes" but failed to advise the driver of his "chemical analysis rights" or request that the defendant provide consent for a blood draw. *Romano,* 800 S.E.2d at 680-81. Here, Ruiz was unconscious before the officer was on the scene, steps were taken to attempt to gain the consciousness of Ruiz, but Ruiz remained unconscious. (Ct. R. vol. 1 of 1, at 8-9, 11-13).

The Kansas Court of Appeals in *State v. Dawes,* No. 111,310, 2015 Kan. App. Unpub. LEXIS 699, 2015 WL 5036690 (Kan. Ct. App. Aug. 21, 2015)(not designated for publication) held that implied consent that was not revoked, because the suspect was unconscious, creates a categorical exception to the warrant requirement, which runs afoul of the ruling in *McNeely*[3].

In *People v. Arredondo,* 245 Cal. App. 4th 186 (Cal. Ct. App. 2016, review granted by 371 P.3d 240 (Cal. 2016) the Court of Appeal of California, Sixth Appellate District, held that the unconsciousness of the defendant prevented him from manifesting his consent voluntarily in the absence of facts sufficient to establish actual consent, or some other exception to the rule, the seizure must be supported by a duly issued warrant. But another California court of appeals has reached the opposite result and the California Supreme Court has granted review to resolve the conflict.[4]

---

[3] The State argues *infra* that implied consent does not create a new per se exception.

[4] In *People v. Ascencio,* 2015 Cal. App. Unpub. LEXIS 6270, *29-40 (Cal. Ct. App. 2015), the Court of Appeal of California, Fourth Appellate District Division One, held that in spite of the driver's refusal at the scene to cooperate with the investigation did not withdraw his implied consent to a blood draw when he became unconscious on the way to the hospital. The court reasoned that the officer could reasonably rely on the fact that the driver's "consent was intact because he was not

The reasoning and rationale of the out of state cases that have held that implied consent can satisfy the consent exception to the warrant requirement are more persuasive and more in line with Texas jurisprudence than the cases reaching the opposite conclusion.

VI. Categorical exceptions

To the extent that Ruiz might argue that the Texas implied consent statutes establish a per se categorical exception to the warrant requirement disavowed by the Supreme Court in *McNeely,* that argument should fail. The Texas implied consent statutes do not set up a categorical exception to the warrant requirement; they merely establish a presumption of consent that can be rebutted by the defendant. *State v. Amaya,* 221 S.W.3d 797, 800-01 (Tex. App.—Fort Worth 2007, pet. ref'd); *State v. Southwell,* 395 S.W.3d 189, 191 (Tex. App.—Waco 2012, no pet.); *Miller v. State*, 387 S.W.3d 873, 880-81 (Tex. App.—Amarillo 2012, no pet.). Here, Ruiz was given the opportunity but did not present any evidence to rebut the statutory presumption of consent and because he bore the initial burden he also assumed the risk

---

capable of responding one way or the other regarding the blood draw; thus, the officer was not faced with a suspect who had overtly refused the test." *Ascencio,* 2015 Cal. App. Unpub. LEXIS 6270 at *32-34, 3

of nonpersuasion. *Kelly,* 204 S.W.3d at 819; *State v. Robinson,* 334 S.W.3d 776, 779 (Tex. Crim. App. 2011).

Moreover, should this Court find that the Texas implied consent statutes establish a per se categorical rule, that rule would be consistent with Supreme Court precedent. In *Birchfield,* the Supreme Court acknowledged that not all categorical rules are disavowed; the search incident to arrest exception, for instance, is categorical. *Birchfield,* 136 S. Ct. at 2179-80. The Supreme Court explained that *McNeely* concerned an exception to the warrant requirement, exigency, that always required a case-by-case determination. *Birchfield,* 136 S. Ct. at 2179-80. As the Supreme Court recognized requiring a search warrant in every driving while intoxicated case would "impose a substantial burden but no commensurate benefit." *Birchfield* 136 S. Ct. at 2181-82. The Supreme Court reasoned that neither purpose of the warrant requirement would be served by requiring a warrant in every DWI case. *Birchfield* 136 S. Ct. at 2181-182. As to the purpose of having a neutral magistrate make a probable cause determine, the officer would only recite the same observations the officer made when deciding they had probable cause to arrest the driver which is "based on the

officer's own characterizations" of the driver's behaviors and a "magistrate would be in a poor position to challenge such characterization." *Birchfield,* 136 S. Ct. at 2181. Secondly, the warrant would not further limit the scope of the search as the warrant in every driving while intoxicated case would be for a blood alcohol content test. *Birchfield,* 136 S. Ct. at 2181.

The Texas implied consent statutes, as they apply to unconscious drivers, would fit comfortably within the Supreme Court's holding and rationale in *Birchfield*. The warrant requirement's purpose of limiting a search's scope would be just as superfluous and there would be even fewer facts than in *Birchfield* for an officer to include and the magistrate to evaluate, especially in a case such as this where the driver was unconscious when the officer made contact with him and he never regained consciousness. As such, even if the Texas implied consent statutes create a categorical rule, it is reasonable under the Fourth Amendment.

VII. Conclusion

Ruiz may not have been able to withdraw or revoke his previously implied consent, but that fact should not undermine the reasonableness

of the blood draw under the Fourth Amendment. It was not overreaching or misconduct on the part of the police that put Ruiz in a place where he was unable to withdraw his consent to the blood draw. Instead, it was Ruiz's own decisions and actions that rendered him incapable of withdrawing his consent. (Ct. R. vol. 1 of 1, at 10-11). Ruiz made a voluntary decision to drive on Texas roadways while intoxicated and lost consciousness due to his high level of intoxication before he ever encountered the police. (Ct. R. vol. 1 of 1, at 10-11). Sgt. McBride did everything in her power to get Ruiz to be conscious so that Ruiz would have had the opportunity to reaffirm his existing consent or to revoke it. (Ct. R. vol. 1 of 1, at 11-13). There was no pressure or coercion *brought to bear by law enforcement* that rendered Ruiz incapable of withdrawing his previously given, voluntary consent. Thus his unconsciousness should not be held to invalidate his consent to the blood draw. *See Meekins,* 340 S.W.3d at 458-59; *Fienen,* 390 S.W.3d at 333, 336.

Ruiz provided his free and voluntary initial consent to alcohol testing when he drove on Texas roadways and assumed the risk that his consent would be deemed to not have been withdrawn if he were to lose

consciousness because of his own actions. *See Welch v. State,* 93 S.W.3d 50 (Tex. Crim. App. 2002)(recognizing that a defendant may assume the risk of a third party consenting to a search on their behalf).

Because Ruiz's consent was presumed, that consent was never limited, withdrawn or revoked, and he failed to present any evidence to rebut the presumption of consent, his consent remained in full effect at the time of the blood draw. Therefore, the trial court erred in granting the motion to suppress.

Prayer for Relief

Wherefore, the State of Texas prays that this Court reverse the decision of the court of appeals.

Respectfully submitted,

Paul Watkins
County Attorney
Gonzales County, Texas

/s/ Keri L. Miller
Keri L. Miller
First Assistant County Attorney
415 Saint Louis Street
Gonzales, Texas 78629
State Bar No. 24051960
kmiller@co.gonzales.tx.us
(830) 672-6527
FAX (830) 672-5868

Certificate of Service

The State has e-served Chris Iles, counsel for Jose Ruiz, through the eFileTexas.gov filing system and sent a copy to The Honorable Stacey M. Soule, State Prosecuting Attorney, on this, the 24th day of May, 2018.

/s/ Keri L. Miller

Certificate of Compliance

This brief complies with the word limitations in Texas Rule of Appellate Procedure 9.4(i)(2). In reliance on the word count of the computer program used to prepare this petition, the undersigned attorney certifies that this document contains 5,940 words, exclusive of the sections exempted by Rule 9.4(i)(1).

/s/ Keri L. Miller
Assistant County Attorney